Supreme Court, U.S
FILED
JAN 03 2011
OFFICE OF THE CLERK

(3)

No. 10-772

In the
Supreme Court of the United States

CITY OF HAZLETON, PENNSYLVANIA,
PETITIONER,

v.

PEDRO LOZANO, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioner

BARNABY W. ZALL
Counsel of Record for Amicus Curiae
Weinberg, Jacobs & Tolani, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

QUESTIONS PRESENTED

1. Whether the provisions of a Hazleton, Pennsylvania, ordinance that encourage employers to utilize the federal E-Verify program to verify employees' work authorization and suspend the business licenses of those employers who have been found to have hired unauthorized aliens are impliedly preempted by federal immigration laws.

2. Whether the provisions of a Hazleton, Pennsylvania, ordinance that prohibit landlords from harboring illegal aliens by knowingly renting apartments to them are impliedly preempted by federal immigration laws.

3. Whether knowingly renting an apartment to an illegal alien constitutes harboring an illegal alien under 8 U.S.C. § 1324(a)(1)(A).

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iv

Statement of Interest 1

Preliminary Statement 2

Summary of Argument 4

Additional Reasons to Grant the Writ 6

I. THE "EQUAL BALANCE" THEORY CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS. 6

A. The "Equal Balance" Theory Originated in an Interpretation of IRCA as Having Only a "Peripheral Concern" About the Employment of Illegal Immigrants 6

B. This Court Unanimously Reversed *NCIR* and Rejected the "Equal Balance" Interpretation of IRCA 11

C. In Response to Recent State and Local Licensing Laws, Some Lower Courts and Litigants Have Revived the "Equal Balance" Interpretation 13

II. SOME COURTS AND LITIGANTS MISTAKENLY CITE THIS COURT'S *NCIR* REVERSAL AS "ON OTHER GROUNDS," SUGGESTING A NEED FOR CLARIFICATION 21

Conclusion 25

Appendix

F.R.A.P. Rule 28(j) Letter from U.S. Department of Justice in *United States of America v. Arizona*, No. 10-16645 (9th Cir.), Doc. 191 ..... App. 1

TABLE OF AUTHORITIES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 24
Carlson v. Landon, 186 F.2d 183 (9th Cir. 1950), *aff'd*, 342 U.S. 524 (1952) 7
Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010) 5, 19, 20, 21
Chicanos Por La Causa v. Napolitano, 558 F.3d 856 (9th Cir. 2009), *cert. granted, Chamber of Commerce v. Whiting*, 130 S.Ct. 3498 (2010), No. 09-115, argued Dec. 8, 2010 ..... *Passim*
De Canas v. Bica, 424 U.S. 351 (1976) 18
Duke Power Co. v. Greenwood County, S.C., 299 U.S. 259 (1936) 24
Edwards v. Prime, Inc., 602 F.3d 1276 (11th Cir. 2010) 15
Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) .3
Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010), *pet'n for reh'g en banc filed* November 16, 2010, Nos. 08-17094, 08-17115 22
Gray v. City of Valley Park, Mo., 2008 WL 294294 (E.D.Mo. Jan 31, 2008) (No. 4:07CV00881 ERW), *aff'd* 567 F.3d 976 (8th Cir. 2009) 20, 22
Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979) 24
Horne v. Flores, __ U.S. __, 129 S.Ct. 2579 (2009) 1
INS v. Nat'l Cen. for Immigrants' Rights, Inc., 499 U.S. 946 (1987) 7, 11
INS v. Nat'l Cen. for Immigrants' Rights, Inc., 502 U.S. 183 (1991) ..... *Passim*
Lozano v. City of Hazleton, 620 F.3d 170 (3rd Cir. 2010) ..... *Passim*
Lozano v. City of Hazleton, 496 F.Supp.2d 477 (M.D.Pa. 2007) 13

Mohawk Industries v. Williams, No. 05-465, *certiorari* dismissed as improvidently granted after argument, 547 U.S. 516 (2006) 1
Nat'l Ctr. for Immigrants' Rights, Inc. v. INS, 791 F.2d 1351 (9th Cir. 1986) 6
Nat'l Ctr. for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991) ..... *Passim*
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 9
Tafflin v. Levitt, 493 U.S. 455 (1990) 15
Taxier v. Sweet, 2 U.S. 81 (1766) 23
United States v. Arizona, 703 F.Supp.2d 980 (D.Ariz. 2010), appeal pending, No. 10-16645 (9th Cir.), argued Nov. 1, 2010 ..... 1, 5, 19, 20, 21
U.S. v. Kim, 193 F.3d 567 (2nd Cir., 1999) 15
U.S. v. Munsingwear, 340 U.S. 36 (1950) 24
U.S. v. Turkette, 452 U.S. 576 (1981) 14
U.S. v. Washington, 593 F.3d 790 (9th Cir. 2010) ... 22
U.S. v. Ye, 588 F.3d 411 (7th Cir. 2009) 15
U.S. v. Zheng, 306 F.3d 1080 (11th Cir., 2002) 15
U.S. Bancorp Mortg. Corp. v. Bonner Mall Partnership, 513 U.S. 18 (1994) 24
Villas at Parkside Partners v. City of Farmers Branch, Tex., 701 F.Supp.2d 835 (N.D. Tex., 2010) 20
We Are America/Somos America Coalition of Maricopa County v. Maricopa County Bd of Supervisors, 594 F.Supp.2d 1104 (D.Ariz. 2009), *aff'd* in part, 386 Fed.Appx 726 (9th Cir. 2010) 22, 23
Williams v. Mohawk Industries, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007) 15

8 U.S.C. §§ 1101 *et seq.* 9
8 U.S.C. § 1324 ..... 14, 15

8 U.S.C. § 1324a 15, 17
8 U.S.C. § 1324(a)(3)(A) 14
8 U.S.C. § 1324(a)(1)(B) 14, 16
8 U.S.C. § 1324a(h)(2) 2
8 U.S.C. § 1357(g) 14
18 U.S.C. §§ 1961-1968 14
18 U.S.C. § 1961(1)(F) 14
Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) ..... *Passim*
Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996) 14
Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941 14

H.R. Rep. 1365, 82d Cong. 2d Sess. (1957) 9
S. Rep. 99-132 (1985) 10
131 CONG. REC. S7039 (May 23, 1985) 10

Congressional Research Service, *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462178 ..... 16, 17
U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003ENF.pdf (Last checked on December 29, 2010) 17
U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, August 2005, GAO-05-813, www.gao.gov/new.items/d05813.pdf (Last checked on December 29, 2010) 17

STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chamber of Commerce v. Whiting*, No. 09-115, *argued* December 8, 2010, *Mohawk Industries v. Williams*, No. 05-465, *certiorari* dismissed as improvidently granted after argument, 547 U.S. 516 (2006), and *Horne v. Flores*, __ U.S. __, __ n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief).

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss the growing number of lower courts, like the Third Circuit here, which rely on an "equal balance" interpretation of congressional intent in the Immigration Reform and Control Act of 1986, even though this Court rejected that interpretation in *INS v. Nat'l Cen. for Immigrants' Rights*, 502 U.S. 183 (1991). The United States put AULDF's analysis of this Court's reversal at issue in a recent filing in the Ninth Circuit in *United States v. Arizona*, No. 10-16645 (9th Cir.), argued November 1, 2010, Docket 191; a copy of that filing is attached as an Appendix.

All parties to this case, through counsel, have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

---

[1]Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and all counsel of record consented to the filing of this brief.

PRELIMINARY STATEMENT

> "The objective of this Act[2] was to stop illegal aliens from working, period."

Nat'l Ctr. for Immigrants' Rights, Inc. v. INS ("*NCIR*"), 913 F.2d 1350, 1375 (9th Cir. 1990) (Trott, J. dissenting), *rev'd*, 502 U.S. 183 (1991).

This case presents the preemption question not reached in *Chamber of Commerce v. Whiting*, No. 09-115, argued Dec. 8, 2010. The Ninth Circuit there[3] held that an Arizona law relating to the employment of illegal immigrants was neither expressly nor impliedly preempted by federal law. *Whiting* asks what constitutes "licensing and similar laws" under the savings clause in the express preemption provision of 8 U.S.C. § 1324a(h)(2).[4] The oral argument on December 8, in this context, discussed the scope of the savings clause and whether the Arizona law fit within that savings clause.

This case presents the next question: even if a state law is not expressly preempted because it is a "licensing or similar law," is it still conflict preempted because the 1986 IRCA permits only

---

[2] The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA").

[3] *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 864-65 (9th Cir. 2009), *cert. granted*, *Chamber of Commerce v. Whiting*, 130 S.Ct. 3498 (2010), No. 09-115, argued Dec. 8, 2010.

[4] "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (**other than through licensing and similar laws**) upon those who employ, or recruit or refer for a fee or other consideration for employment, unauthorized aliens." *Id.* (emphasis added).

"tempered" or "carefully balanced" federal administrative enforcement? *NCIR*, 913 F.2d at 1366.

Here, the Third Circuit found that the City of Hazleton ordinance in question is a licensing law within the express preemption savings clause. *Lozano v. City of Hazleton*, 620 F.3d 170, 208-09 (3rd Cir. 2010). The Third Circuit then said that the Hazleton ordinance was still subject to review for conflict preemption. 620 F.3d at 210, *citing*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870-72 (2000). The Third Circuit held that the Hazleton ordinance's "employment provisions stand as an obstacle to the accomplishment and execution of federal law, and thus are pre-empted." 620 F.3d at 210.

The Third Circuit cited *NCIR* for the proposition that Congress had crafted a "careful balance" in IRCA. 620 F.3d at 211.

> Over the course of numerous sessions, Congress debated taking the theretofore unprecedented step of directly prohibiting the employment of "unauthorized aliens." Congress ultimately committed to enacting employer sanctions, but in so doing, **committed equally** to enacting measures that would protect groups likely to be unfairly burdened by those sanctions – employers and authorized workers. IRCA is thus "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected."

Id. (footnote omitted; emphasis added).

This case asks whether the *NCIR* interpretation of IRCA can be revived (or was never

rejected) to preempt state and local laws which are not "committed equally" to, or "equally balanced" between, enforcement and other measures.

SUMMARY OF ARGUMENT

The "committed equally" or "equal balance" argument in favor of preemption of state and local laws which are too "enforcement-oriented" is a revival and expansion of the Ninth Circuit analysis in *NCIR*. In *NCIR*, this Court remanded an earlier finding that the immigration laws had only a "peripheral" interest in the employment of illegal immigrants so the Ninth Circuit could consider the effect of IRCA. A divided panel of the Ninth Circuit held that, even after IRCA, Congress did not feel that unauthorized employment presented such a danger to the country to justify "drastic" measures similar to those authorized under the Internal Security Act of 1950. The panel crafted the "balance" interpretation to justify its belief that Congress wanted only "tempered" enforcement.

Judge Trott dissented from the panel majority opinion in *NCIR*. He rejected the panel majority's analysis of IRCA, saying that Congress's objective in IRCA "was to stop illegal aliens from working, period." IRCA "fortified," not undercut, the traditional purpose of immigration laws to protect American workers.

This Court reviewed *NCIR*, looking in particular at the analysis of congressional intentions on enforcement to determine whether the panel majority's "tempered enforcement" or "balance" interpretation was consistent with congressional intent in IRCA. This Court unanimously reversed,

finding, as did Judge Trott, that the traditional protective purpose of the immigration laws was "forcefully" recognized in IRCA. There matters rested; no court cited the *NCIR* "balance" argument until the District Court here in 2007.

In the intervening years, however, federal enforcement of immigration laws in the workplace collapsed, leading several states to adopt measures to deal with the consequences. In response, litigants (including the United States) revived the "equal balance" interpretation and the reversed *NCIR* decision as a rationale for preemption.

Some courts have upheld some of these laws, rejecting the "equal balance" interpretations. *See, e.g., Chicanos Por La Causa*, 558 F.3d at 866-67. Others, using the "equal balance" theory, have struck down state laws which are judged too enforcement-oriented, as did the Third Circuit here, the Tenth Circuit in *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 767 (10th Cir. 2010), and the District Court of Arizona in *United States v. Arizona*, 703 F.Supp.2d 980, 1001 (D.Ariz. 2010).

Using this reversed interpretation undermines traditional immigration law protections for American workers, exactly as this Court predicted in 1991, and at a time when federal law enforcement has collapsed and American workers most need protection.

There is no certainty that the Court will reach the "equal balance" theory in *Chamber of Commerce v. Whiting*. This Court should grant the Petition to clarify the viability of the "equal balance" theory.

In addition, some lower courts and litigants are citing this Court's reversal of *NCIR* as "rev'd on other grounds." Two weeks ago, for example, the U.S. Department of Justice told the Ninth Circuit that this

Court did not reverse the "equal balance" interpretation of IRCA in *NCIR*. This Court's reversal does not appear to have been "on other grounds." There is no caselaw discussing the appropriate use of this phrase, and the mis-citations may indicate a need to clarify the effect of this Court's opinions.

ADDITIONAL REASONS TO GRANT THE WRIT

I. THE "EQUAL BALANCE" THEORY CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

A. The "Equal Balance" Theory Originated in an Interpretation of IRCA as Having Only a "Peripheral Concern" About the Employment of Illegal Immigrants.

The "equal balance" interpretation of IRCA apparently originated in the Ninth Circuit's 1990 opinion in *NCIR*. 913 F.2d at 1366 ("a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"), *quoted* at 620 F.3d at 211.

In an earlier decision in *NCIR*, the Ninth Circuit rejected a "no-work" bond condition for illegal immigrants released pending immigration proceedings because of the immigration laws' "peripheral concern ... with the employment of illegal aliens." 791 F.2d 1351, 1356 (9th Cir. 1986). This

Court vacated and remanded that decision for review in light of the newly-passed IRCA. *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 499 U.S. 946 (1987).

On remand, the Ninth Circuit asked whether the Attorney General's regulations were founded on "considerations rationally related to the statute he is administering." 913 F.2d at 1360. To find this relationship, the Ninth Circuit said it would "examine employment as a focus of the INA, including the amendments put in place by IRCA, for its relevance to the question of detention and bond conditions." *NCIR*, 913 F.2d at 1358. The Ninth Circuit explained that it viewed the purpose of the rule as preventing the employment of illegal immigrants: "the administrative notice promulgating the rule stated explicitly that prevention of employment by illegal aliens and safeguarding of employment of United States citizens and permanent resident aliens was more important than increased detention costs." 913 F.2d at 1360.

The Ninth Circuit acknowledged that "Virtually every immigration act and amendment has dealt in some fashion with employment policy, and ... employment is an important concern of immigration law." 913 F.2d at 1364. It then reviewed IRCA to see if it "represented a Congressional finding regarding the dangers of unauthorized employment." 913 F.2d at 1366.

The Ninth Circuit compared IRCA to the Internal Security Act of 1950, 913 F.2d at 1360-61, and, citing *Carlson v. Landon*, 186 F.2d 183, 187 (9th Cir. 1950), *aff'd*, 342 U.S. 524 (1952), answered its own question in the negative: IRCA "states a **tempered enforcement policy** qualitatively different from the sweeping concerns with subversion

of the Internal Security Act." 913 F.2d at 1366 (emphasis added).

The Ninth Circuit then said "Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation addressed in ... the Internal Security Act." 913 F.2d at 1366-67. "While the INS argues that the authority to detain aliens is consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the **careful balance** which Congress achieved in IRCA." 913 F.2d at 1367-68 (emphasis added). "The emphasis on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the ... harsh and inhumane measures at issue here." 913 F.2d at 1369.

The Ninth Circuit concluded that "[u]nauthorized employment has never been held to justify detention, and IRCA made no findings of danger to the nation like the Congressional findings in the Internal Security Act." 913 F.2d at 1374. It struck the regulation as not rationally-related to the purposes of the INA after IRCA. *Id*.

This is the context in which the "equal balance" theory originated: "IRCA made no findings of danger to the nation" from "unauthorized employment," and thus enforcement provisions were to be "tempered" and "balanced" against other competing goals.

Ironically, the *NCIR* panel included Judge Stephen Trott, who had been Assistant Attorney General of the United States during the development of IRCA and Associate Attorney General during the

three years after passage.[5] Judge Trott rejected the panel majority position, describing the traditional purpose of the immigration laws as protecting American workers:

> An unmistakable purpose of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* ("INA") is to provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country. H.R. Rep. 1365, 82d Cong. 2d Sess. 51 (1957). As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB,* "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984).
>
> This purpose, if anything, was **fortified** by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) which reiterated the desire of Congress to erect at the borders barriers designed to protect U.S. citizens, and others here with lawful permission to work, from competition by illegal aliens not authorized by law to work in this country.

913 F.2d at 1374-75 (emphasis added).

Judge Trott also rejected the "balance" of purposes in IRCA. He summarized the congressional intent behind IRCA: "The objective of this Act was to

---

[5] www.fjc.gov/servlet/nGetInfo?jid=2416&cid=999.

stop illegal aliens from working, period." 913 F.2d at 1375.

> The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the **primary thrust** of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

913 F.2d at 1375 (emphasis added).

Judge Trott's interpretation seems well-founded.[6] Congress did not commit "equally" to "preventing the hiring of unauthorized aliens, lessening the disruption of American business, and

---

[6] "The major purpose of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are actually implemented through adequate enforcement." S. Rep. 99-132, at 3. "Unless illegal immigration is brought under control, I and many others, fear an increasing public intolerance - a lack of compassion if you will - to all forms of immigration - legal and illegal. It is this unwanted and wretched result that this bill today attempts to avoid." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson).

minimizing the possibility of employment discrimination."[7] 620 F.3d at 211.

The United States sought review of the Ninth Circuit's opinion, noting that "while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment." Appellate Petition, *INS v. Nat'l Center for Immigrants' Rights,* No. 90-1090, 1991 WL 11009301, at 8 n. 8 (emphasis in original).

B. This Court Unanimously Reversed *NCIR* and Rejected the "Equal Balance" Interpretation of IRCA.

This Court accepted certiorari, limited to the question of whether the regulation was authorized by statute. 499 U.S. 496 (1991). In other words, which doctrine would control: the panel majority's "equal balance" interpretation that the statute permitted only "tempered enforcement" measures, or Judge Trott's "stop illegal aliens from working, period" interpretation?

---

[7] In its "Purpose and Summary" of S. 1200, the Senate Judiciary Committee did not even mention these other "competing policy objectives." S. Rep. 99-132, at 1-2. The Senate Judiciary Committee summarized the bill's "Purpose" in one sentence: "The Committee bill is intended to increase control over illegal immigration." S. Rep. 99-132, at 1. The legislative history of IRCA and later laws in this regard is discussed in more detail in AULDF's *amicus* brief in *Chamber of Commerce v. Whiting*, No. 09-115, pp. 20-28.

This Court unanimously rejected the panel majority's interpretation, reversed and remanded the case. 502 U.S. at 188, 196.

This Court first recounted the history of the case, rejecting the original *NCIR* panel's characterization by saying that the passage of IRCA had "cast serious doubt on the Court of Appeals' conclusion that employment of undocumented aliens was only a 'peripheral concern' of the immigration laws." 502 U.S. at 187.

This Court then rejected the Ninth Circuit's interpretation of the disputed regulation as applying to all employment, and said it only affected "*unauthorized* employment." 502 U.S. at 189 (emphasis in original). This Court did not "consider whether the release of an alien who is authorized to work could be subjected to a 'no-work' condition." 502 U.S. at 191. "In this case, the Government's argument proceeds on the assumption that the 'Act as a whole' – including its concern with the employment of excludable aliens – should define the scope of the Attorney General's discretion." 502 U.S. at 193. In contrast:

> It is respondents who would excise employment from the statutory scheme, ... the contested regulation, when properly construed as applicable only to *unauthorized* employment, does not raise "constitutional doubts" and therefore does not militate in favor of a narrow construction of the organic statute.

502 U.S. at 193.

This Court rejected the Ninth Circuit's analogy to the Internal Security Act of 1950. 502 U.S. at 193 ("too cramped"). Instead, this Court noted that the:

> stated and actual purpose of no-work bond conditions was "to protect against the displacement of workers in the United States." ... We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers.

502 U.S. at 194.

In a footnote, this Court rejected the panel majority's belief that IRCA permitted only a "tempered enforcement policy." This Court seemed to agree with Judge Trott that the purpose of IRCA "was to stop illegal aliens from working, period": "This policy of immigration was **forcefully** recognized most recently in the IRCA." 502 U.S. at 194, n. 8 (emphasis added). "The contested regulation is wholly consistent with this established concern of immigration law, and thus squarely within the scope of the Attorney General's statutory authority." 502 U.S. at 194.

This Court concluded: "The judgment of the Court of Appeals is therefore reversed and the case is remanded for further proceedings consistent with this opinion." 501 U.S. at 196.

C. In Response to Recent State and Local Licensing Laws, Some Lower Courts and Litigants Have Revived the "Equal Balance" Interpretation.

There the matter rested for sixteen years. No court raised the "equal balance" interpretation of IRCA until the District Court opinion in this case. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 528 (M.D.Pa. 2007)("The two laws, however, strike a

different balance between these interests. The laws, therefore, conflict.").

In the meantime, however, Congress took other steps which were arguably inconsistent with the "tempered enforcement policy" or "equal balance" interpretation of congressional intent. For example, seeking more enforcement capability, Congress formalized the "287g" program to expressly promote state-federal cooperation in immigration law enforcement. 8 U.S.C. § 1357(g).

Congress also expanded 8 U.S.C. § 1324 to penalize directly (as opposed to being considered harboring) the hiring of more than ten illegal immigrants per year. 8 U.S.C. § 1324(a)(3)(A), Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996), Div. C, Title II, § 203(b)(4).

In addition, Congress increased the penalties under § 1324 for employing illegal immigrants to include lengthy prison terms, and in some cases, possibly the death penalty. 8 U.S.C. § 1324(a)(1)(B).

Also in 1996, Congress amended the list of RICO[8] predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) ... if the act ... was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

---

[8]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

"Competing objectives," such as lessening the burden on business and preventing discrimination, were not the purpose of these changes. For example, use of 8 U.S.C. § 1324 (instead of "employer sanctions" under § 1324a) subjects employers to liability for hiring illegal immigrants without any "balance" against burden or anti-discrimination rules.[9] Similarly, the addition of RICO liability exposes employers of illegal immigrants to state-level RICO suits. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Williams v. Mohawk Industries*, 465 F.3d 1277, 1293-94 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007).

---

[9] *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or shielding from detection."); *U.S. v. Kim*, 193 F.3d 567, 573 (2nd Cir., 1999) ("the evolution of § 1324(a)(i)(A)(iii) to its present form makes clear that Congress intended it to cover employers . . . The fact that employers are also targeted by § 1324a provides no support for Kim's contention that he should have been prosecuted under § 1324a."); *U.S. v. Ye*, 588 F.3d 411 (7th Cir. 2009). As the Eleventh Circuit noted in *U.S. v. Zheng*, 306 F.3d 1080, 1087 (11th Cir., 2002):

> The legislative history demonstrates that Congress intended § 1324 to cover employers such as the Appellees. Congress expressly noted the pervasive problem of illegal alien employment and its harmful effect on the American worker. Each time an employer hires an illegal alien, an American citizen loses an employment opportunity. Congress understood this problem and chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them.

Nor could the imposition of the death penalty for hiring illegal immigrants be considered "tempered enforcement." 8 U.S.C. § 1324(a)(1)(B). Some might consider it "harsh," rather than "fair and humane enforcement of the immigration laws." *NCIR*, 913 F.2d at 1369. Even if the Ninth Circuit had fairly summarized congressional intentions in IRCA (which this Court held it did not), its *NCIR* assessment is no longer accurate.

For a time after the 1986 enactment of IRCA, the federal enforcing agencies seemed to abide by the statutory priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law."[10] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration."[11]

By 1996, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

---

[10] Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37.

[11] *Id.*

In 1998, however, INS abandoned the "effective" strategy of "Operation Vanguard" *because* it was effective. "When the capability was realized, it was stopped." CRS, *Immigration Enforcement*, at 39; *see, also, id.*, at 61-62 (describing May 1998 INS "Immediate Action Directive for Worksite Enforcement Operations" ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id.* at 38, 62, not because Congress changed the law.

As a result, the reality of worksite immigration enforcement was substantially different from Congress's intention: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ."[12]

GAO's bland language masks the true extent of the "decline." Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%.[13] The figures have not rebounded since.[14]

---

[12] U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement Weaknesses*"), August 2005, GAO-05-813, at 30 (emphasis added).

[13] Sources: 1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. *See*, AULDF's *amicus curiae* brief in *Chamber of Commerce v. Whiting*, No. 09-115, pp. 31-34.

[14] *Id.*

Thus, there is, effectively, no interior immigration law enforcement for the vast majority of illegal immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. If other illegal immigrants are apprehended, they are to be released, not deported.

The effect of this enforcement collapse falls most heavily on low-income and young American workers:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.

De Canas v. Bica, 424 U.S. 351, 356-57 (1976).

Absent clear congressional ouster, states have the authority to act to prevent these "local problems." *Id.* As a result of the collapse of interior law enforcement, several state and local governments have attempted to protect their own interests. *See, e.g.*, Pet. at 7.

In response to these new laws, litigants have cited the *NCIR* "equal balance" interpretation of IRCA. In *Chamber of Commerce v. Whiting*, No. 09-115, argued December 8, 2010, for example, the

Petitioners rely on the "equal balance" argument to argue an implied preemption case. Petitioner's Br. in No. 09-115, at 37-47. "Finally, Arizona's unauthorized worker regime disrupts the balance that Congress struck among its various policy objectives." *Id.*, at 42. The Arizona law at issue in that case "disrupt[s] the careful balance struck by Congress." Petitioner's Reply Br. in No. 09-115, at 13, 17-20.

Even the United States has asserted the "equal balance" argument for preemption. "[T]he Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established." Brief for the United States as *Amicus Curiae*, in No. 09-115, at 9.

In *United States v. Arizona*, now on appeal to the Ninth Circuit, the United States expressly denied that this Court reviewed or rejected the *NCIR* "balance" interpretation. *See*, F.R.A.P. Rule 28(j) letter of December 17, 2010 in *United States v. Arizona*, No. 10-16645 (9th Cir.), Doc. 191, *reprinted* in Appendix to this Brief at App. 3 ("the Supreme Court's opinion is fully consistent with this Court's analysis of IRCA's legislative history.").

Some courts, hearing these challenges, have upheld some of these laws, rejecting the "equal balance" interpretations. *See, e.g., Chicanos Por La Causa*, 558 F.3d at 866-67; *Gray v. City of Valley Park, Mo.*, 2008 WL 294294 (E.D.Mo. Jan 31, 2008) (No. 4:07CV00881 ERW), *19 ("the emphasis on preventing the hiring of illegal aliens is a goal shared by the Federal and local law").[15] One district court

---

[15] Although the District Court in *Valley Park* ruled on the preemption question, the only questions appealed were standing and preclusion, on which the Eighth Circuit affirmed.

found a local ordinance preempted as a regulation of immigration and an obstacle to uniform application of federal law, but without discussing the "equal balance" theory. *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F.Supp.2d 835 (N.D.Tex., 2010).

Other courts, using the "equal balance" theory, have struck down state laws as too enforcement-oriented, as did the Third Circuit here, the Tenth Circuit in *Edmondson*, 594 F.3d at 767, and the District Court of Arizona in *United States v. Arizona*, 703 F.Supp.2d at 1001.

In *Edmondson*, for example, the Tenth Circuit upheld a preliminary injunction against a state law requiring use of the federal immigration verification database at issue in this case because, *inter alia*, it felt that the plaintiffs could demonstrate a likelihood of success in demonstrating that the state law was preempted. 594 F.3d at 771. "IRCA thus embodies a carefully considered balance of various competing objectives." 594 F.3d at 767-68. "We conclude that Section 9 similarly upsets Congress' carefully constructed balance by interfering with its chosen methods." 594 F.3d at 769.

The District Court for Arizona also relied on *NCIR* to enjoin, on preemption grounds, portions of a state law similar to that at issue here. *United States v. Arizona*, 703 F.Supp.2d at 1001.

These are just the beginning. The expansion of claims under the "equal balance" interpretation threatens an unending flood of cases claiming that particular enforcement measures are not "tempered"

Gray v. City of Valley Park, Mo., 567 F.3d 976, 980 (8th Cir. 2009).

enough, or disturb some imagined "balance." Pet. at 22-24.

The resurrection of the "equal balance" interpretation of IRCA may do what this Court predicted in reversing *NCIR*: undermine traditional protections for American workers, in contradiction to decades of settled immigration precedents. There is no reason to revive an interpretation so soundly rejected by this Court in 1991.

This Court should grant the writ to review the Third Circuit's use of the "equal balance" interpretation of IRCA.

II. SOME COURTS AND LITIGANTS MISTAKENLY CITE THIS COURT'S *NCIR* REVERSAL AS "ON OTHER GROUNDS," SUGGESTING A NEED FOR CLARIFICATION.

As noted above, this Court's 1991 opinion seemed to reject the *NCIR* panel majority's "equal balance/tempered enforcement" interpretation of IRCA, and support Judge Trott's "stop illegal aliens from working, period" interpretation. Several courts, including the Third Circuit below, however, have characterized the *NCIR* reversal as "on other grounds", meaning on grounds other than the "equal balance" interpretation. *Lozano*, 620 F.3d at 211; *Edmondson*, 594 F.3d at 771; *United States v. Arizona*, 703 F.Supp.2d at 1001.

It is unclear why the reversal is being so characterized. The reversal was not expressly conditioned or limited. The dichotomy between the *NCIR* panel majority's interpretation and Judge Trott's was readily apparent, and contained within

both the Question Presented and the Court's discussion. The reversal opinion of this Court mentions the page numbers of the "balance" analysis, accurately and completely characterizes that analysis, rejects the case interpretations on which the analysis rests, and concludes by echoing Judge Trott in reasserting the primacy of the purpose of the immigration laws to protect American workers.

In contrast, for example, in *City of Valley Park, Mo.*, the District Court found that an ordinance similar to the Hazleton ordinance struck down here was not preempted. 567 F.3d at 980. That finding was not appealed to the Eighth Circuit. The Eighth Circuit expressly stated the lower court's preemption finding and ruled only on standing and preclusion, thus leaving in place the preemption finding (which conflicts with the Third Circuit's analysis here).

Nor do more recent Ninth Circuit opinions defer to the reversed *NCIR* opinion, although the Ninth Circuit's law of the circuit doctrine would otherwise require following the *NCIR* interpretation if it were still operative. *United States v. Washington*, 593 F.3d 790, 798 n. 9 (9th Cir. 2010). In *Chicanos Por La Causa*, 558 F.3d at 864-65, for example, the unanimous Ninth Circuit opinion cites only to this Court's opinion reversing *NCIR*.

Similarly, in an unreported memorandum decision this year, another panel[16] of the Ninth

---

[16] The *We Are America* panel included Judges Kozinski and Ikuta, who also sat on the panel in *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *pet'n for reh'g en banc filed* November 16, 2010, Nos. 08-17094, 08-17115. The *Gonzalez* decision, which found preemption of an Arizona voter identification law on

Circuit did not rely on the *NCIR* "tempered enforcement policy" or "equal balance" interpretation when it said: "Arizona has an important interest in enforcing its criminal statutes, and it's not 'readily apparent' that federal law preempts Ariz.Rev.Stat. § 13-2319 or Maricopa County's enforcement policy." *We Are America/Somos America Coalition of Maricopa County v. Maricopa County Bd of Supervisors*, 386 Fed.Appx 726 (9th Cir. 2010). In *We Are America*, the Ninth Circuit reviewed a District Court finding that federal law did not preempt an Arizona law criminalizing alien smuggling. The District Court found that the Arizona law was harmonious with federal law. 594 F.Supp.2d 1104, 1110-14 (D.Ariz. 2009). The *We Are America* District Court distinguished the conflict preemption finding of the District Court here, 594 F.Supp.2d at 1113-14, but held that it should abstain from deciding the issue. 594 F.Supp.2d at 1116. The Ninth Circuit affirmed the abstention analysis, but remanded to review standing. 386 Fed.Appx 726.

In other words, this Court's holding in *NCIR* does not seem like a reversal "on other grounds" and is not being treated as such even by the Ninth Circuit. It appears to be a complete reversal of the entire Ninth Circuit opinion, including the "equal balance" interpretation. The reversal supports Judge Trott's "stop illegal aliens from working, period" interpretation of IRCA.

There appears to be no controlling caselaw governing the use of the phrase "reversed on other grounds." *Taxier v. Sweet*, 2 U.S. 81 (1766)(Court

---

Elections Clause grounds, includes an extensive discussion of the Ninth Circuit's law of the circuit doctrine.

equally divided on whether reversal equivalent to vacatur). This is not a case where the appeal became moot because of happenstance or action by the prevailing party. *U.S. Bancorp Mortg. Corp. v. Bonner Mall Partnership*, 513 U.S. 18, 22-28 (1994).

Nor is this a case where the remand was intended to let the *NCIR* panel revisit the same issue, *Duke Power Co. v. Greenwood County, S.C.*, 299 U.S. 259, 268 (1936). The Ninth Circuit had two attempts to analyze the immigration laws, and this Court rejected its analysis each time. 502 U.S. at 187, 196. Thus, where a vacatur would "clear[] the path for future relitigation," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), *quoting United States v. Munsingwear*, 340 U.S. 36, 40 (1950), here there seems no indication that this Court wanted this issue relitigated; there is every indication that this Court considered the matter settled.

The Third Circuit's (and other courts' and litigants') citation of the reversed *NCIR* opinion "may have been the result of a desire to show approval of the reasoning." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979). That "desire" does not excuse ignoring this Court's "teaching." *Id.* And thus the citation should not include a misleading explanatory signal intended to give more weight to the "desire."

Since this citation of the reversal as "on other grounds" has appeared in different courts across the country, and the United States has recently told the Ninth Circuit that it denies the reversal of the IRCA interpretation, *see* App. 3, it appears that some clarification of the nature of the reversal in *NCIR* is appropriate. Otherwise, litigants will continue to make this mischaracterization and courts will continue to rely on the reversed decision.

This Court should grant the writ to review the lower courts' use of the reversed *NCIR* decision, and to give direction as to whether there is any appropriate use.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

BARNABY W. ZALL
Counsel of Record for Amicus Curiae
Weinberg, Jacobs & Tolani, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

December 30, 2010

APPENDIX

F.R.A.P. Rule 28(j) Letter from U.S. Department of Justice in *United States of America v. Arizona*, No. 10-16645 (9th Cir.), Doc. 191.

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW, Room 7531
Washington, D.C. 20530
Tel: (202) 514-5089
Fax: (202) 307-2551

December 17, 2010

VIA CM/ECF

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States of America v. Arizona*, No. 10-16645 (9th Cir.)
Argued November 1, 2010 before Judges Noonan, Paez, and Bea

Dear Ms. Dwyer:

Pursuant to F.R.A.P. 28(j), the United States hereby responds to the November 24, 2010, letter filed by Amicus Curiae American Unity Legal Defense Fund. Amicus belatedly and incorrectly suggests that the Supreme Court disapproved this Court's analysis

of IRCA's legislative history in *National Center for Immigrants' Rights v. INS*, 913 F.2d 1350, 1367-69 (9th Cir. 1990), when it reversed this Court's holding on grounds unrelated to that analysis. This Court determined that "[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*" for working without authorization, "it ultimately rejected all such proposals." *Id.* at 1368. The Supreme Court cast no doubt on that observation. Instead, the Supreme Court disagreed with this Court's construction of the regulation and statute at issue in that case, neither of which is relevant here. *See INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991). The Supreme Court also described this Court's reliance on cases construing the Attorney General's detention authority as "misplaced" and "too cramped." *See id.* at 193 (citing *United States v. Witkovich*, 353 U.S. 194 (1957); *Carlson v. Landon*, 342 U.S. 524 (1952)). That conclusion likewise has no bearing on this Court's analysis of IRCA.

The Supreme Court's observation that immigration restrictions have been designed in part to "preserve jobs for American workers," *id.* at 194 (internal quotation marks omitted), echoes this Court's observation that Congress sought to address "serious problems associated with illegal employment, including loss of jobs for low-income Americans," 913 F.2d at 1367. It in no way calls into question this Court's conclusion about the means Congress chose to address that problem.

Amicus notes that *before* the passage of IRCA this Court had characterized the INA's concern with employment as "peripheral." *See INS*, 502 U.S. at 186-87 (quoting *Nat'l Ctr. for Immigrants' Rights*,

Inc. v. INS, 791 F.2d 1351, 1356 (9th Cir. 1986)). That prior characterization has no bearing on this Court's subsequent analysis of IRCA's legislative history.

In short, the Supreme Court's opinion is fully consistent with this Court's analysis of IRCA's legislative history.

Sincerely,

TONY WEST
Assistant Attorney General

DENNIS K. BURKE
United States Attorney

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
THOMAS M. BONDY
MICHAEL P. ABATE
DANIEL TENNY
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

s/ Thomas M. Bondy

s/ Daniel Tenny
Attorneys for the United States
cc (by CM/ECF): All Counsel of Record